IN THE

Supreme Court of the United States

October Term, 1924.

No. 141

Kinnear & Co., Inc., Appellant
vs.
United States of America, Appellee

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

Raymond M. Hudson,
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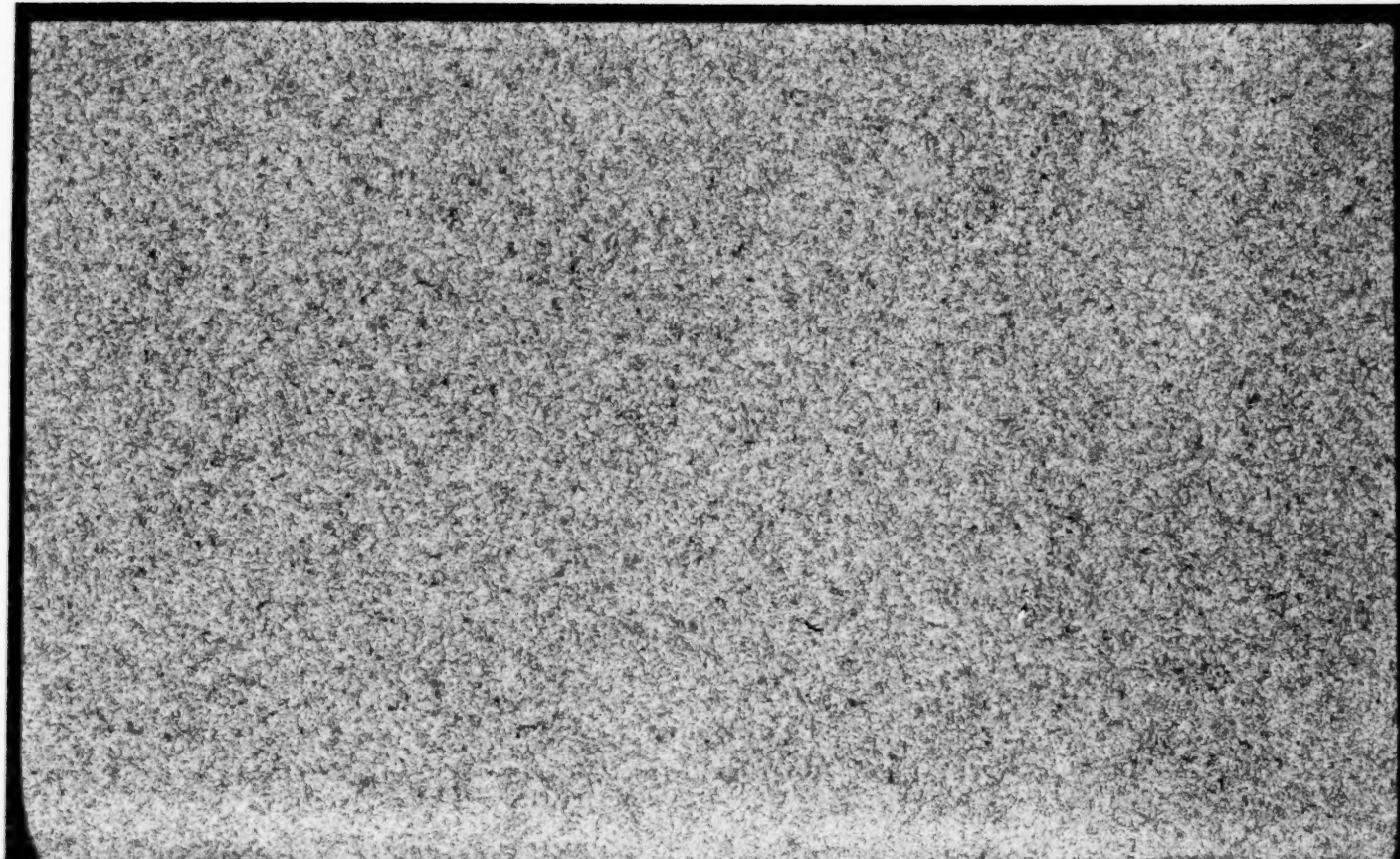

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KUNHARDT & CO., INC., *Appellant*
vs.
UNITED STATES OF AMERICA, *Appellee*

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STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of

Claims sustaining a demurrer to a petition which alleged that on September 10, 1918, an *obligatory* order No. 810030 to *grow,* only, 50,000 to 75,000 bushels of castor beans in Honduras, F. O. B. vessel at Puerto Cortez with an option of the Government to have delivery at Gulf ports, completion of deliveries to be by August 31, 1919.

There is no cancellation clause in this order which is Exhibit "A" (p. 6).

This was followed by an amended order dated September 20, 1918, ReO-810030. This order is also *obligatory.* It is Exhibit "B-1" (p. 10).

This order (top of p. 11) changed the other order to make "Delivery of above at warehouse, Puerto Cortez, for inspection, to be completed by August 31, 1919."

If the Government exercised its option for Gulf port deliveries the claimant would not have had to begin same until after the completion of inspection after August 31, 1919.

Contract No. 4683 (p. 8) Exhibit "B" followed the orders and it was designated requisition No. B-6111 and while it was dated September 16, it was not signed until October 7, 1918.

The Government's needs for beans becoming urgent and insistent in October, so that it could not wait for beans to be grown, it called the claimant to Washington (paragraphs 9 and 11, pp. 4 and 5) and issued another *obligatory* order, Exhibit "C" (p. 11) dated November 6, 1918, not only for the *growing* of beans *but* also for the *purchasing* of beans either in Honduras or Guatemala, delivery to be at New Orleans, and deliveries to be completed by August 31, 1919, and the right was reserved to the Government to *cancel only* the *purchase clause* but no other clause or terms of the order; all the orders required a $15,000.00 bond, which was

given by the contractor. .

In October the appellant owned a schooner the "Herbert May," which it had no use for and had negotiated the sale of, but had not closed the sale, at $75,000.00, and the Government required and forced the claimant to retain the boat to use it for the transportation of the beans (par. 10, p. 4).

As the claimant had no freight to take on the southbound trip for the first load of beans, it negotiated for a cargo, with the Government's assent and approval, as no cargoes could be transported except with the Government's approval at that stage of the war.

After this, on November 14, 1918, the Government terminated the obligatory orders (par. 5, p. 3).

Later the Government sent to the claimant contract No. 5345, Exhibit "D" (p. 12) being requisition No. B-8842, and demanded the claimant to execute same although the orders had been terminated and it was now December 19, 1918, although the contract was dated back to November 12, 1918, two days ahead of the date of the cancellation of the orders.

For this contract there seems to be no consideration.

This contract contained a cancellation clause (p. 14, art. 5, sec. 2, par. (d)), which provided among other things for payment of depreciation or amortization of equipment, etc.; Article 17, (p. 19) provided for settlement by mutual agreement between contractor and contracting officer.

The appellant was really coerced under the war powers of the Government to sign this contract and under these circumstances it was not a voluntary agreement. There was no consideration for it as the obligatory orders were then cancelled.

Negotiations then began for a settlement of the amounts due the appellant and a Government officer,

Mr. Joseph Shay, made an agreement with the claimant to pay it $35,000.00, of which $10,521.22 was for the depreciation on the schooner "Herbert May" (par. 7 and 8, p. 4) and this was done under an investigation made by the contracting officer, Capt. Wiley, who executed a contract to this effect, being contract No. 5346-A, Exhibit "D-1" (p. 21) dated January 30, 1919, which recited in the last "Whereas" clause, (p. 22) that such investigation had been made.

It further recited that it was a settlement of contract No. 5346, order No. 810066; it was authorized under article 5, section 2, paragraph (d) of contract No. 5346.

That article of No. 5346 only required that the contracting officer make the agreement and did not require its approval by the Board of Contract Review of Aircraft Production, and it was not approved by said Board.

The Government refused to pay the $35,000.00 under this agreement, which is a binding agreement and then Capt. Wiley as contracting officer, executed "Contract No. 5346; contract No. 81006" which is Exhibit "E" (p. 23), dated May 17, 1919, which recites that it settled contract No. 5346, "which superseded contract No. 4683" under which the Government agreed to pay $24,478.78 as a settlement of all claims "except a claim which the contractor reserves herewith for depreciation of the schooner "Herbert May."

It is alleged (par. 8, p. 4) that the appellant only agreed to accept the $10,521.22 because it was greatly pressed for money.

The Government paid $24,478.78 but did not pay the $10,521.22 or any amount on account of damages or loss of appellant on the "Herbert May."

ASSIGNMENTS OF ERROR

The court erred:

1. In sustaining the demurrer.
2. In holding no cause of action alleged.
3. In holding orders and contracts not obligatory orders or requisitions.
4. In denying recovery for depreciation of the "Herbert May," notwithstanding Art. 5, Sec. 2, par. (d) (p. 14) of contract, Exhibit "D."
5. In denying right to recover $10,521.22 for depreciation on the "Herbert May," as agreed upon between contractor and contracting officers, by contract, Exhibit "D-1" (p. 21), which as provided under contract, Exhibit "D," Art. 5, Sec. 2, par. (d) did not have to be approved by any board or other officer.
6. In denying right to recover any amount for depreciation of the "Herbert May," which recovery was specifically provided for by contract, Exhibit "E," art. 3 (p. 24).
7. In holding Government not liable for damages for forcing claimant to accept another contract after part performance.
8. In holding Government not liable for market value of the "Herbert May" as of November 6, 1919, with interest, less what it sold for, as just compensation for a taking under eminent domain.

ARGUMENT

POINT I

THE ORDERS IN THIS CASE FILED AS EXHIBITS ARE OBLIGATORY ORDERS AND CONSEQUENTLY THE CONTRACTS ARE OB-

LIGATORY CONTRACTS OR REQUISITIONS AND NOT VOLUNTARY.

In Roxford Knitting Company vs. Moore & Tierney, 265 Fed. 177 (Certiorari denied, 40 Sup. Ct. 588) the Court held that "orders" for supplies for the Army and Navy under the President's proclamation, and the National Defense Act, 39 Stat. 166 (Comp. St. par. 3115g) 39 Stat. 619; Navy Purchase Act 39 Stat. 1193; Urgent Deficiency Act 40 Stat. 182; War Resolution 40, Stat 1, made such "orders" obligatory on any person to whom such "orders" were given, and the Court states at p. 180:

> "These orders were all placed after the enactment of the National Defense Act, 39 Stat. 166. The defendant insists that all four of these orders were contracts voluntarily entered into, and that contracts with the government for military supplies, even in time of war, afford no excuse for the nonperformance of civil contracts. If the orders were contracts voluntarily made, we agree that the performance of contracts so made was not entitled to precedence over other contracts previously taken.
>
> The National Defense Act of June 3, 1916, c. 134: 120 (Comp. St. 3115g), empowered the President in time of war, or when war is imminent, through the head of any department of the government to place orders for such products as might be required, and made orders so given obligatory, and gave them precedence over all other orders and contracts. It made any individual or the responsible head of any association or corporation failing to comply with the provisions of the section

guilty of a felony, and provided that upon conviction he should be punished by imprisonment for not more than three years and by a fine not exceeding $50,000. See U. S. Stat. at Large, vol. 39 pt. 1, c. 134: 120, p. 213. The constitutionality of this act is not challenged. That its enactment was a lawful exercise of the war powers of Congress must be conceded."

"By an act of Congress passed on August 29, 1916, (39 Stat. 619), a Council of National Defense was established, for the co-ordination of industries and resources for the national security and welfare. It consisted of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor. The Council of National Defense was authorized to nominate to the President, who was directed to appoint, an advisory commission, each of whom was to possess special knowledge of some industry, or otherwise be specially qualified in the opinion of the Council for the performance of the duties imposed. It was made the duty of the Council to direct investigations and make recommendations to the President and the heads of executive departments, among other things, of data as to amounts, location, method, and means of production, and availability of military supplies, and to give information to producers and manufacturers as to the class of supplies needed by the military and other services of the government, the requirements relating thereto, and the creation of relations "which will render possible in time of need the immediate concentration and utilization of the resources of the nation," and the Council was authorized to adopt rules and regulations for the conduct of its

work, which were to be subject to the approval of the President, and was to provide for the work of the advisory commission. U. S. Stat. at Large, vol. 39, c. 418: 2, p. 649 (Comp. St. 3115c)."

"On March 4, 1917, Congress passed the Navy Purchase Act (39 Stat. 1193), which provided as follows:

> "(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:
>
> "First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts therefore placed with such person."

"On April 6, 1917, Congress passed a resolution (40 Stat. 1), which was on the same day approved by the President, declaring that a state of war existed between the United States and the Imperial German government. On June 15, 1917, Congress passed the Urgent Deficiency Act which provided as follows:

> "(c) To require the owner or occupier of any plant in which ships or materials are built or pro-

duced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. * * *

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, *supply,* furnish or manufacture the kind, quantities, or qualities of the ships or materials so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient." U. S. Stat. at Large, vol. 40, pt. 1. c. 29 p. 182 (Comp. St. 1918; Comp. St. Ann. Supp. 1919: 3115-16d)" and again at p. 185:

"As respects the first 'order,' dated June 6, 1917, there appears in the record what is entitled 'Contract for Supplies.' * * * " It declares that—

"These articles of agreement entered into this 6th day of June, 1917, between Colonel M. Gray Zalinski, Quartermaster Corps, United States

> Army, of the first part, for and in behalf of the United States of America, and Moore & Tierney, * * * witness that the said parties do hereby mutually covenant and agree. * * * "

"As respects the second 'order,' dated July 25, 1917, it appears that the Navy Department, under date of July 23, 1917, notified the plaintiff that 'the following classes in your proposal for naval supplies * * * are hereby awarded you under contract No. 31378,' and that in due course a formal contract would be forwarded for execution; and under date of July 25, 1917, the department states that 'a contract numbered as stated above (No. 31378), and dated 4th August, 1817, had been entered into with plaintiff."

"As respects the third 'order,' the War Department, under date of November 15, 1917, notified the plaintiff in writing as follows":

> "In accordance with your offer, contract is awarded you for furnishing and delivering at the New York depot of this corps. * * * "

"Then followed the statement that 'this contract will be dated November 16, 1917.' This was signed 'H. L. Hirsch, Colonel, Q. M. Corps, in Charge.' Then, under date of November 30, 1917, a letter was written to the plaintiff, stating that there was inclosed the 'contract' in triplicate, dated November 16, 1917, which plaintiff was requested to sign and return at the earliest practicable date."

"As respects the fourth 'order,' the War Department, under date of December 11, 1917, informed the plaintiff that 'in accordance with your offer, contract is awarded you for furnishing to this corps. * * *'

Then followed the statement 'This contract will be dated December 12, 1917.' Prior to the awarding of this contract, and on December 7, 1917, the Committee of the Council of National Defense, advising 'the following purchase' from the plaintiff of the undershirts and drawers in the amounts and prices as they were afterwards included in the award of the contract above referred to under date of December 11, 1917."

"*All four of the plaintiff's 'orders' thus appear in the record as formal contracts, reduced to writing and signed by the contracting parties, with their names at the end thereof.* An order, strictly speaking is a command or a direction. Hence defendant insists that what the plaintiff calls 'orders' were not in reality orders, placed pursuant to a commandeering statute, *but ordinary voluntary contracts,* and it asserts that such contracts made with the Government, even in time of war, afford no legal excuse for the nonperformance of civilian contracts and that if such civilian contracts are to be displaced it can be only because some statute has so provided. The National Defense Act has not so provided, but has empowered the President 'to place and order,' and made 'all such orders' obligatory, and provided that 'they (the orders) shall take precedence over all other orders and contracts."

and again at p. 191:

"And when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received within the spirit and intent and the letter of the statute, whether the authoritative *direction is written or oral,* and notwithstanding the fact that the parties actually come to an agreement in what has the form of a con-

tract. *Substance is not to be sacrificed in such cases to form.*"

and again at p. 182:

"The majority of the Court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded of it, that it had no right to refuse to comply, and that with this understanding, the supplies were furnished. That being so, effect should be given to the intent of Congress that civil contracts should be postponed to orders compulsorily placed."

The orders were given and then followed by contracts and the court held such contracts were not voluntary but obligatory or requisitions.

This case was approved and distinguished by this Court in a note to Price and Co. vs. U. S., 43 Sup. Ct. 299, at 301; 261 U. S. 179, as was the case of United States vs. Russell, 13 Wall. 623.

> "A requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescense on the part of a loyal citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract, or the entering into of an agreement in the legal sense of that term, for the obtaining of the property in question. A requisition is a one-sided exercise of authority which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest is entered or not, the obligation to repay the owner is the same." Benedict vs. U. S., 271 Fed. at p. 719..

The contracts at the heading are marked Requisi-

tions by using the term "Req. No. B-6111," "Req. B-8842." Therefore, they amount to a taking under eminent domain and the appellant is entitled to the difference in the value of the boat the last October and on November 6, 1918, and the time when it was released from the Southern trip, which was forced upon the appellant by the Government, the difference being $35,000.00 with interest from November 6, 1918.

> "The parties were not on equal terms. The eppellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required." Swift vs. U. S., 111 U. S. 22.

In U. S. vs. Russell, 13 Wall. 623, it was held that the *temporary* taking of personal property makes the Government liable for the damage or depreciation in value during the time the property was held by the Government and used to its benefit.

In Vogelstein vs. U. S., 43 Sup. Ct. at 565, a case on mandatory orders, the Court said:

> "The market value of the copper taken at the time it was taken measures the owner's compensation. Seaboard Air Line Railway Co. vs. United States, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923; United States vs. Chandler-Dunbar Co., 229 U. S. 53, 80, 81; 33 Sup. Ct. 667; 57 L. Ed. 1063; Boom Co. vs. Patterson, 98 U. S. 403, 407; 25 L. Ed. 206; U. S. vs. New River Colleries Co. (C. C. A.) 276 Fed. 690, affirmed this day 262 U. S. 341, 43 Sup. Ct. 565."

In the New River Colleries case (above) the Court said, at p. 557:

> "Nor was it an error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. *The owner cannot be required to suffer pecuniary loss.* Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking."

> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing or trying to purchase export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *The facts indicate a free market. The owner had a right to sell in that market and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.*" (Italics mine.)

The allegations of the petition and the character of the orders as shown on their face clearly seem to establish under the decision a taking and as stated by Mr. Justice Holmes in Portsmouth Etc. Co. vs. United States, 43 Sup. Ct. 136; 260 U. S. 327; "a contract would be implied whether it was thought of or not."

POINT II

IF THE ORDERS AND CONTRACTS WERE NOT OBLIGATORY AND REQUISITIONS, THEN THE CHANGING OF THE SAME, THERE BEING NO CANCELLATION CLAUSE, WAS A FORCING OF A NEW AND DIFFERENT AGREEMENT UPON THE APPELLANT, FOR WHICH THE GOVERNMENT IS LIABLE FOR ALL COSTS AND DAMAGES, INCLUDING THE PROFITS.

In Freund vs. U. S. 260 U. S. 60; 43 Sup. Ct. 70, the Court in approving U. S. vs. Stage Co., 199 U. S. 414; 26 Sup. Ct. 50 and Hunt vs. U. S., 257 U. S. 125; 42 Sup. Ct. 5, held that mail contractors, who, after bidding on a contract and executing the contract, were compelled to accept a different and more burdensome route, which under the contract the department was not authorized to substitute, were entitled to recover the reasonable value of their services, including a fair profit. In Chas. Nelson vs. U. S., 261 U. S. 17; 43 Sup. Ct. at 303, the Court approved the Freund case above and stated that it involved conduct of questionable fairness on the part of the Government officers towards the contractor.

There was no cancellation clause in any of the orders or contracts until Exhibit "D," which was not executed until after all the orders and contracts had been terminated by the Government, and the changing of such orders and forcing the appellant to retain the "Herbert May" when they had a sale for it, requires that the Government pay for what the appellants lost in not then being allowed to sell the "Herbert May," the loss being the difference between the market price

then $75,000.00, and the market price when sold, just after it was released, which was $40,000.00.

POINT III

THERE BEING NO CANCELLATION CLAUSE IN THE ORDERS AND CONTRACT, THE GOVERNMENT IS LIABLE FOR PREVENTING, BY SUCH OBLIGATORY ORDERS, AND STATUTES UNDER WHICH THEY WERE ISSUED, A SALE OF THE "HERBERT MAY."

This proposition is sustained by Roxford Knitting Company vs. Moore & Tierney above and Benedict vs. U. S. above.

POINT IV

WHERE THE GOVERNMENT ISSUED AN ORDER AND THEN TERMINATED SAME BEFORE EXECUTING THE CONTRACT COVERING SAME, SUCH CONTRACT IS NOT EFFECTIVE AND BINDING AND THERE IS NO CONSIDERATION FOR IT, AND THE GOVERNMENT IS BOUND TO PAY JUST COMPENSATION ON THE CANCELLATION OF THE ORDERS FOR THE PROPERTY TAKEN WHICH WAS THE "HERBERT MAY."

This is clearly sustained in Brooks-Scanlon vs. U. S., 44 Sup. Ct. 471, the Court saying at p. 474:

> "It is settled by the decisions of this court that just compensation is the value of the property

taken at the time of the taking. Vogelstein & Co. vs. United States, 262 U. S. 337, 340, 43 Sup. Ct. 564, 67 L. Ed. 1012; United States vs. New River Collieries, 262 U. S. 341, 344, 43 Sup. Ct. 565, 67 L. Ed. 1014; Seaboard Air Line Ry. vs. United States, 261 U. S. 299, 306, 43 Sup. Ct. 565, 67 L. Ed. 664; Monongahela Navigation Co. vs. United States, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. Seaboard Air Line Ry. vs. United States, supra; United States vs. Benedict, 261 U. S. 294, 298, 43 Sup. Ct. 357, 67 L. Ed. 662; United States vs. Brown, 44 Sup. Ct. 92."

See also Russell's case, 13 Wall. 623.

POINT V

IF SUCH A CONTRACT AS EXHIBIT "D," EXECUTED AFTER THE ORDER WAS TERMINATED BY THE GOVERNMENT, IS EFFECTIVE THEN A SETTLEMENT AGREEMENT EXECUTED THEREUNDER BY THE CONTRACTING OFFICER, SUCH AS EXHIBIT "D-1," IS BINDING AND EFFECTIVE AND DOES NOT HAVE TO BE APPROVED BY A BOARD. THE GOVERNMENT IS LIABLE TO PAY THE AMOUNT CALLED FOR THEREIN.

The contract Exhibit "D-1" recited that the con-

tracting officer, Capt. Wiley, caused an investigation to be made of such expense and obligations and the petition alleges (pars. 7, 8 and 14) that another Government officer, Mr. Shay, found and agreed that $10,521.22 should be paid for depreciation on the "Herbert May."

In the absence of any allegation or statement otherwise of any bad faith on the part of Mr. Shay and of Capt. Wiley, the Court must assume that in executing Exhibit "D-1" that they complied with the requirements of article 5, sec. 2, par. (d) Exhibit "D" (p. 4). Ripley vs. U. S. 32 Sup. Ct. 60 and 352; 222 U. S. 144 and 223 U. S. 695 and 750; Ripley vs. U. S. 31 Sup. Ct. 478; 220 U. S. 491; U. S. vs. Gleason, 20 Sup. Ct. 228 at 233; 175 U. S. 588.

The Government is bound by the adjustments and decisions of the contracting officers as held by the Court in Yale & Towne vs. U. S. 59 Ct. Cls. ....., and as stated by the Supreme Court in U. S. vs. Mason & Hanger, 260 U. S. 323; 43 Sup. Ct., 128 at 129 as follows:

> "We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. Kihlberg vs. United States, 97 U. S. 398, 24 L. Ed. 1106; Martinsburg & Potomac Railroad Co. vs. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; United States vs. Gleason, 175 U. S. 588; 20 Sup. Ct. 228, 44 L. Ed. 282; Ripley vs. United States, 223 U. S. 695, 32 Sup. Ct. 352, 56 L. Ed. 614. This is extending the rule between private parties to the government."

Under these decisions the least that the Government could be held liable for is $10,521.22 called for for de-

preciation in this Exhibit "D-1."

And the Government could not in violation of that agreement when the claimant was hard up (par. 8) force a new agreement upon it (especially if the orders are obligatory) simply because some Board did not want to approve the contract.

Of course, by stating we are entitled to this $10,-521.22, we are not waiving our claim to the full $35,-000.00 and interest, but simply stating that if we are not entitled to the larger sum we are certainly entitled to the lesser sum.

POINT VI

HAVING ISSUED AND EXECUTED EXHIBITS "D," "D-1," AND "E" AFTER TERMINATING THE ORDERS, THE GOVERNMENT IS ESTOPPED TO DENY ITS LIABILITY FOR THE DEPRECIATION OR AMORTIZATION OF THE "HERBERT MAY." THE ONLY QUESTION LEFT OPEN IS THE AMOUNT DUE TO THE APPELLANT IN EXCESS OF $10,521.22.

The rule of estoppel applicable to private parties clearly would estop any private party acting as the Government has acted in this case, Morgan vs. R. R. Co., 96 U. S. 716, 720; Dickinson vs. Colgrove, 100 U. S. 578; National Bank vs. Meniger, 95 Fed. 87.

The Court held in Smoot's case, 15 Wall. at 45, that the Court must apply to government contracts the ordinary of contracts, and the same rule was enforced in U. S. vs. Mason & Hanger above.

The orders and contracts being requisitions and obligatory and not voluntary, the Government cannot reduce its liability by contracts and then repudiate its

acts and orders.

POINT VII

THE FORCING OF THE OBLIGATOI Y ORDERS OR REQUISITIONS ON THE A 'PELLANT AND REQUIRING IT TO KEEP ' HE "HERBERT MAY" AND USE IT TH REUNDER WAS A TAKING UNDER EMINE T DOMAIN OF THE "HERBERT MAY," FR(M NOVEMBER 6, 1918, UNTIL AUGUST 31, 1 19, OR THE DATE SHORTLY BEFORE THEN 'HEN THE "HERBERT MAY" WAS RELEA 3ED FROM THE SERVICE.

As the Government gave instructions requesting the appellant to hold the "Herbert May" and to send it at once for a load of beans, she was repaired and the cargo was arranged with the Government for the Southern trip. No cargoes could be arranged under war orders without the consent of the Government.

After this cargo was arranged and there was no way to be relieved therefrom the Government terminated the orders, Exhibit "A," "B-1," and "C," and as soon as the boat reached the southern port she was sold at its then market value (par. 13, p. 5) for $40,000.00. The appellant's loss on the trip down was $2000.00 (par. 12, p. 5).

The contract, Exhibit "D," specifically provided for the difference in market value, thus evincing that the Government officers considered that they were taking the boat or equipment on a basis of paying for it under the rule applicable to a taking of property under eminent domain. The quotation above from the Brooks-Scanlon case sustains this, and under point 1, it is

claimed that the appellant has clearly alleged a case entitling it to recover $35,000.00 and interest.

In American Smelting and Refining Co. vs. U. S., 259 U. S. 75, 42 Sup. Ct. 420, the Court held that the claimant by completing performance does not waive his claim, for the Government violating the agreement.

Wherefore, the appellant insists that the judgment of the Court of Claims be reversed and the demurrer overruled and the case remanded with costs.

Respectfully submitted,

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